

MINUTES FOR THE BOARD OF ADJUSTMENT MEETING

November 18, 2011

- I. **ATTENDANCE** - The Chairman called the meeting to order at 1:01 p.m. in the Council Chambers, 200 East Main Street, on November 18, 2011. Members present were Chairman Louis Stout, Barry Stumbo, Kathryn Moore, Janice Meyer and James Griggs. Members absent were Noel White and Thomas Glover. Others present were Jim Hume, Division of Building Inspection; Chuck Saylor, Division of Engineering; Jim Gallimore, Division of Traffic Engineering; and Rochelle Boland, Department of Law. Staff members in attendance were Jim Marx, Jimmy Emmons and Wanda Howard.

At this point, Chairman Stout asked all those persons present who would be speaking or offering testimony to stand, raise their right hand and be sworn. He administered the oath to those in attendance.

- II. **APPROVAL OF MINUTES** - The Chairman announced that the minutes of the October 28, 2011 meeting would be considered at this time.

Action – A motion was made by Mr. Stumbo, seconded by Ms. Meyer, and carried unanimously (White, Glover absent) to approve the minutes of the October 28, 2011 meeting.

III. **PUBLIC HEARING ON ZONING APPEALS**

- A. **Sounding The Agenda** - In order to expedite completion of agenda items, the Chairman sounded the agenda in regard to any postponements, withdrawals, and items requiring no discussion.

1. **Postponement or Withdrawal of any Scheduled Business Item** - The Chairman announced that any person having an appeal or other business before the Board may request postponement or withdrawal of such at this time.

- a. **C-2011-70: BOONE CREEK ADVENTURES, LLC** - appeals for a conditional use permit to construct and operate an agricultural market and outdoor recreational facility with accessory camping facilities in the Agricultural Rural (A-R) zone, on property located at 8291 & 8385 Old Richmond Road and 8385 Durbin Lane. (Council District 12)

The Staff Recommends: Postponement of the agricultural market portion of the conditional use,
for the following reason:

1. An indefinite postponement has been requested by the appellant, which will allow them time to more fully consider the relationship between the agricultural market and outdoor recreational facility, and related issues such as management and timing of construction. The staff is in agreement with this request.

The Staff Recommends: Approval of a conditional use permit for the outdoor recreational facility,
for the following reasons:

- a. An outdoor recreational facility of the type proposed should not adversely affect the subject or surrounding properties. All of the activities will be very passive in nature, with very little noise generated and minimal disturbance taking place to the existing topography and ground cover. No significant increase in traffic is anticipated, and most of the improvements and activities will not be visible from Old Richmond Road.
- b. The portion of the subject property close to Old Richmond Road is accessible for emergency response purposes, with a fire station located approximately 2 miles away. Emergency response provisions will be made by the appellant for the less accessible portions of the property, pursuant to an emergency response action plan to be reviewed and approved by the LFUCG Fire Prevention Office. Garbage pick-up and sewage disposal will be handled privately, subject to approval by the Fayette County Health Department.

- c. The subject property is well suited for use as an outdoor recreational facility, given the outstanding scenic values, unique geology, and significant natural and cultural resources of the Boone Creek gorge.

This recommendation of approval is made subject to the following conditions:

1. The recreational facility shall be established in accordance with the submitted application and revised site plan of November 1, 2011, limited to the portion of the subject property located only on the east side of Old Richmond Road.
2. All necessary permits, including a Certificate of Occupancy, shall be obtained from the Division of Building Inspection prior to opening the facility.
3. A parking area with at least 15 but not more than 30 off-street parking spaces shall be provided at the welcome center, designed in accordance with the requirements of the Division of Traffic Engineering, and landscaped as specified by Article 18 of the Zoning Ordinance.
4. An Emergency Response Action Plan shall be implemented as part of the day-to-day operation of the recreational facility. This plan shall be approved by the LFUCG Fire Prevention Office prior to obtaining an occupancy permit. The plan shall include, at the minimum, provisions for handling emergencies in areas of the property not accessible by emergency response vehicles.
5. Each of the 13 lodging shelters shall not exceed 225 square feet in size.
6. Provisions for handling garbage and sewage shall at all times comply with the requirements of the Fayette County Health Department.
7. Suspension bridges over Boone Creek to Clark County shall not be constructed, nor any related activities undertaken in Clark County, until such time that all necessary conditional use permits and other needed approvals are obtained from the Winchester/Clark County Board of Zoning Adjustments or other applicable arm of that local government.

Representation – Mr. Bruce Simpson, attorney, was present on the appellant's behalf. He said they had met with representatives of the neighborhoods in that area, as well as the Fayette Alliance, and had agreed to continue discussions regarding their application. Therefore, he requested a postponement of this case until the December 16 meeting.

After determining that there was no opposition to the requested postponement, the Chairman called for a motion.

Action – A motion was made by Mr. Griggs, seconded by Mr. Stumbo, and carried unanimously (White, Glover absent) to postpone **C-2011-70: BOONE CREEK ADVENTURES, LLC** until the December 16 meeting.

Mr. Marx noted that tours of the Boone Creek Adventures facility were being set up, which the Board members and interested parties were invited to attend. With regard to the Board, he suggested smaller groups to possibly avoid having to provide legal notice as for an official meeting. The tentative dates for the tours were: November 21, 23, 29 and 30. Mr. Marx said, in concurrence with the Chairman's suggestion, that the Board could contact him to schedule the tour date they preferred, which would be passed on to Mr. Simpson.

Chairman Stout requested that Mr. Simpson provide any additional written information to the Board about this conditional use request prior to the December hearing, in order for the Board to understand it thoroughly and make an informed decision.

- b. **A-2011-76: DAVID BENNETT / LEXINGTON GREEN** - appeals for an administrative review to allow a shopping center identification sign on a stone planter box that will project into the street right-of-way, in a Planned Shopping Center (B-6P) zone, on property located at 161 Lexington Green Circle. (Council District 9)

The Staff Recommends: Postponement, for the following reasons:

1. A determination needs to be made regarding the correct property that this appeal should be filed under. At the minimum, documentation is needed that the appellant has sufficient legal interest in the subject property to pursue the requested sign appeal. Alternatively, it may be necessary to amend the application and re-notice area property owners to include

- the property known as 3211 Nicholasville Road, which is not owned by the appellant.
2. There is some uncertainty as to whether or not the prohibition on signage projecting into a right-of-way can be waived by the Board. Further evaluation of this issue in consultation with the Department of Law is necessary.
 3. Additional investigation is needed to determine the most appropriate manner that existing signage on the mall's property can be classified, and how that might relate to the potential for erecting an additional shopping center identification sign.
 4. Depending on how these interrelated issues are resolved, it may be necessary to file a variance request to reduce the required sign setback to 0', which would give the appellant the opportunity to place the sign up to but not beyond the right-of-way boundary.

Representation – Ms. Elizabeth Pitchford, with Ruggles Sign Company, was present representing the appellant and requested a postponement, in concurrence with the staff's recommendation. After conferring with staff, and considering the number of issues that needed to be addressed, the decision was made to postpone this matter to the January meeting.

Action – A motion was made by Mr. Stumbo, seconded by Ms. Moore, and carried unanimously (White, Glover absent) to postpone **A-2011-76: DAVID BENNETT / LEXINGTON GREEN** to the January 27 meeting.

2. No Discussion Items - The Chairman asked if there are any other agenda items where no discussion is needed...that is, (a) The staff has recommended approval of the appeal and related plan(s), (b) The appellant concurs with the staff's recommendations. Appellant waives oral presentation, but may submit written evidence for the record, (c) No one present objects to the Board acting on the matter at this time without further discussion. For any such item, the Board will proceed to take action.
- a. **V-2011-72: JAMES M. LUDKA** - appeals for a variance to reduce the required side yard from 3' to 0', and alley setback from 6' to 1', in order to retain an existing fence in a Planned Neighborhood Residential/Historic District Overlay (R-3/H-1) zone, on property located at 432 North Broadway. (Council District 1)

The Staff Recommends: Withdrawal of the alley setback variance, for the following reasons:

1. The provisions of Article 15-6(a)(2) specifically relate to accessory buildings, not to fences.
2. Article 15-4(b) permits a fence up to 8' in height within a front yard created by abutment to an alley. The subject property is a "through lot" with a front yard that abuts Caldwell Alley.
3. Driver visibility concerns are more appropriately addressed by Article 3-3 of the Zoning Ordinance pertaining to the maintenance of sight distance triangles.

The Staff Recommends: Approval of the requested side yard variance, for the following reasons:

- a. Reducing the required side yard from 3' to 0', only for the purpose of allowing the preexisting portion of the fence to remain where currently located, should not adversely affect the public health, safety, or welfare, nor alter the character of the area. Similar fences are common in the general vicinity.
- b. The location of the preexisting fence on the side property line is a special circumstance that contributes to justifying a side yard reduction.
- c. Strict application of the Zoning Ordinance would result in all portions of the fence not to the rear of the dwelling having to be placed 3' back from the side property line. This would create an awkward jog in the fence, and would result in a design that is clearly out of character with how other fences have been erected in this historic neighborhood.
- d. The appellant is attempting to maintain a historic property in a manner that is consistent with how other properties in the neighborhood have been developed, and there is no indication of any intent to circumvent a requirement of the Zoning Ordinance.

This recommendation of approval is made subject to the following conditions:

1. The fencing may remain where currently located, as depicted in the submitted application and site plan, subject to any modifications that may be required to comply with Article 3-3 of the Zoning Ordinance relating to the maintenance of sight distance triangles.
2. If deemed necessary by the Division of Historic Preservation, a Certificate of Appropriateness, or other type of applicable permit, shall be obtained for the final location

and design of the fence within the Northside Historic District.

3. A fence permit shall be obtained from the Division of Building Inspection within 30 days of action by the Board and/or the Board of Architectural Review, whichever is later.

Chairman Stout asked whether there were objectors to the subject appeal present. There was no response.

Representation – Mr. James M. Ludka, appellant, was present along with Mr. T. J. Manges, a partner in the restoration of the property at 432 North Broadway.

In response to the Chairman's inquiry about the withdrawal of the alley setback variance recommended by staff, Mr. Ludka said the site plan they now proposed would address the issue of the sight line going back to the alleyway. However, Mr. Marx noted that the sight triangle issue was not under the Board's purview and should, instead, be reviewed by the Division of Traffic Engineering, which was the reason for the staff's recommendation of withdrawal with respect to the requested variance. He said this was something they would have to address through the permitting of any fence revisions for that section of the fence.

Chairman Stout asked whether the proposed plan had been submitted to Traffic Engineering or staff. Mr. Ludka responded that it had not. Chairman Stout stated that since the Board was not in a position to make a decision on this issue, he made the suggestion that the appellant accept the withdrawal on that portion of the variance regarding the alley setback and submit their proposal to Traffic Engineering.

With regard to the requested side yard variance, Chairman Stout asked if Mr. Ludka had read and understood the staff's recommendation, and would abide by the conditions recommended for approval. Mr. Ludka responded affirmatively.

Action – A motion was made by Mr. Stumbo, seconded by Ms. Meyer, and carried unanimously (White, Glover absent) to approve **V-2011-72: JAMES M. LUDKA** (a variance to reduce the required side yard from 3' to 0' in order to retain an existing fence in a Planned Neighborhood Residential/Historic District Overlay [R-3/H-1] zone on property located at 432 North Broadway) for the reasons listed by the staff and subject to the three conditions.

Mr. Marx said he thought some official action was needed on the withdrawal. In response, Ms. Boland said she thought the issue was that Mr. Ludka didn't need the alley setback variance, as the staff explained in their report, because it is only required for buildings rather than fences. Therefore, the appellant would need to agree to withdraw that portion of the variance request. Mr. Ludka responded, when asked by the Chairman, that he would agree to the withdrawal.

- b. **V-2011-78: LEXINGTON LAND COMPANY, LLC** - appeals for a variance to increase the allowable floor area ratio from .35 to .5 for the construction/retention of an addition to a multi-family dwelling being converted to a duplex in a Planned Neighborhood Residential/Historic District Overlay (R-3/H-1) zone, on property located at 354 Linden Walk. (Council District 3)

The Staff Recommends: Approval, for the following reasons:

1. Granting the requested variance should not adversely impact the public health, safety or welfare, nor alter the character of the general vicinity. The number of living units to be provided will be reduced, with no increase in the number of bedrooms. Building improvements will be done in accordance with a Certificate of Appropriateness issued by the Board of Architectural Review in March of 2011, for work within the Aylesford Historic District.
2. The size and overall layout of the preexisting structure are special circumstances that are relevant to a consideration of how floor area ratio limitations can reasonably be altered in the R-2 zone.
3. Strict application of the Zoning Ordinance would force the appellant to maintain three living units in the building, which would not be materially different than the nine bedroom duplex now proposed.
4. The circumstances surrounding this variance request have resulted from the appellant's desire to improve the property while also reducing the number of dwelling units, in a

situation where the preexisting structure already exceeded a floor area ratio of .35.

This recommendation of approval is made subject to the following conditions:

1. The duplex shall be established in accordance with the submitted application and site plan, subject to compliance with the Certificate of Appropriateness issued by the Board of Architectural Review on March 10, 2011, or as amended by the BOAR.
2. All necessary permits shall be obtained from the Division of Building Inspection prior to conversion of the dwelling into a duplex.
3. Occupancy of the duplex shall be managed in a manner that complies with the provisions of Article 1-11 of the Zoning Ordinance pertaining to two-family dwellings.

Chairman Stout asked whether there were objectors to the subject appeal present. There was no response.

Representation – Mr. Richard Murphy, attorney, was present, along with Mr. Craig Hardin, president of the Lexington Land Company. He said they were in agreement with the staff's recommendation and the conditions.

Mr. Griggs commented that the requested variance for this property was similar to that for the property at 331 Aylesford Place, which Mr. Hardin also owns. He asked if there was something about the zoning regulations that requires the appellant to keep coming back to the Board. Mr. Murphy responded that there is; and that they would address that issue with the Board to see whether an amendment to the Zoning Ordinance could be initiated.

Mr. Murphy explained the variance they were requesting to increase the maximum allowable floor area ratio from .35 to .5 for what will be a duplex in the R-3 zone. He said Mr. Hardin purchased the property less than a year ago; and there is an existing four-unit residential structure on the property that he wishes to remodel and convert into a two-unit residential structure. The floor area ratio for a duplex in the R-2 zone is .35, which this building, at .5, exceeds. He said, considering the reduction in the number of units in the building to two, there is a section in the Ordinance regarding the R-3 zone that says if you want to build a duplex in the R-3 zone, you must go by the lot requirements for the R-2 zone.

Mr. Murphy said the applicable zoning regulation was really designed for when a new duplex is built on a vacant lot in the R-3 zone, where you have to meet the .35 floor area ratio. The Ordinance never contemplated that people would be reducing the number of dwelling units on an existing R-3 property; and every time this happens, they would have to come back to the Board to ask for a variance. He said if three units were to remain, it wouldn't be necessary to come to the Board at all, because they meet the .5 floor area ratio.

Mr. Griggs commented that this provision in the Zoning Ordinance was complicated, as written, and needs to be altered so applicants such as Mr. Hardin wouldn't need to come before the Board repeatedly. He asked if the Board could recommend to the staff that Mr. Murphy talk to Planning and Zoning about a text amendment to clarify this portion of the zoning ordinance and make allowances for what they need to do. Mr. Murphy said he thought so; and that they would be willing to talk to staff about that possibility.

Ms. Moore asked whether the variance would still be necessary if they were not increasing the size of the structure. Mr. Murphy responded affirmatively. She then asked if counsel had any comments. In response, Ms. Boland said she thought Mr. Murphy had explained the situation pretty well. She said it was the act of converting the structure to a duplex that subjects it to the lower floor area ratio requirement.

Chairman Stout asked how difficult it was to get a text amendment to the Zoning Ordinance. Mr. Marx said he thought a text amendment would be relatively simple; and that they would have to consider whether or not, and in what situations, it is reasonable to truly expect a .35 floor area ratio to apply to two-family dwellings.

Since there were no further questions or discussion, the Chairman called for a motion.

Action – A motion was made by Mr. Griggs, seconded by Ms. Moore, and carried unanimously (White, Glover absent) to approve **V-2011-78: LEXINGTON LAND COMPANY, LLC** (a variance to increase the allowable floor area ratio from .35 to .5 for the construction/retention of an addition to a multi-family dwelling being converted to a duplex in a Planned Neighborhood Residential/Historic District Overlay [R-3/H-1] zone on property located at 354 Linden Walk) based on the staff's recommendation and subject to the three conditions.

- c. **C-2011-75: GARY CLARK, DVM, PLLC** - appeals for a conditional use permit to establish an animal clinic in one suite of an existing shopping center in a Neighborhood Business (B-1) zone, on property located at 1590 Leestown Road, Ste. 128. (Council District 2)

The Staff Recommends: Approval, for the following reasons:

1. Granting the requested conditional use permit should not adversely affect the subject or surrounding properties. Adequate off-street parking will be provided, and the building will be soundproofed in accordance with the requirements of the Division of Building Inspection. The nearest adjoining properties are used for industrial and office purposes, which are unlikely to be disturbed by the proposed use.
2. All necessary public facilities and services are available and adequate for the proposed use.

This recommendation of approval is made subject to the following conditions:

1. The small animal clinic shall be established in accordance with the submitted application and site plan.
2. An occupancy permit shall be obtained from the Division of Building inspection prior to opening the clinic.
3. The exterior wall of the suite to be occupied shall be soundproofed as determined to be feasible by the Division of Building Inspection.
4. All pens shall be located inside of the subject suite.

Chairman Stout asked whether there were objectors to the subject appeal present. There was no response.

Representation – Mr. Joe Hoffman was present representing the appellant, who also was present. He indicated that they had read, understood and agreed to abide by the conditions for approval.

Since there were no questions or concerns, the Chairman called for a motion.

Action – A motion was made by Ms. Meyer, seconded by Ms. Moore, and carried unanimously (White, Glover absent) to approve **C-2011-75: GARY CLARK, DVM, PLLC** (a conditional use permit to establish an animal clinic in one suite of an existing shopping center in a Neighborhood Business [B-1] zone on property located at 1590 Leestown Road, Ste. 128) as recommended by staff and subject to the four conditions outlined by staff.

- B. **Transcript or Witnesses** - The Chairman announce that any applicant or objector to any appeal before the Board is entitled to have a transcript of the meeting prepared at his expense and to have witnesses sworn.
- C. **Variance Appeals** - As required by KRS 100.243, in the consideration of variance appeals before the granting or denying of any variance the Board must find:

That the granting of the variance will not adversely affect the public health, safety or welfare, will not alter the essential character of the general vicinity, will not cause a hazard or a nuisance to the public, and will not allow an unreasonable circumvention of the requirements of the zoning regulations. In making these findings, the Board shall consider whether:

- (a) The requested variance arises from special circumstances which do not generally apply to land in the general vicinity, or in the same zone;
- (b) The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land or would create an unnecessary hardship on the applicant; and

- (c) The circumstances are the result of actions of the applicant taken subsequent to the adoption of the zoning regulation from which relief is sought.

The Board shall deny any request for a variance arising from circumstances that are the result of willful violations of the zoning regulation by the applicant subsequent to the adoption of the zoning regulations from which relief is sought.

1. **V-2011-77: SABLE HOLDINGS** - appeals for variances to reduce: a) the required lot frontage from 50' to 35'; b) the minimum front yard from 20' to 5'; c) the minimum side and rear yards from the required setback of each to 0'; d) the usable open space from 20% to 0%; e) the required parking from 5 spaces to 3 spaces; and f) setbacks for the existing accessory building from 1.5' to 0', in a High Density Apartment/Historic District Overlay (R-4/H-1) zone, on property located at 615 - 617 West Short Street. (Council District 1)

The Staff Recommends: Approval, for the following reasons:

- a. Granting the requested variances should not adversely affect the public health, safety or welfare, nor will it negatively impact the character of the general vicinity. No building expansions are proposed, and all existing buildings will be retained at their current location. The appearance of the property from W. Short Street should improve considerably due to the replacement of asphalt paving with front yard landscaping.
- b. The manner in which this particular property has developed over the years is clearly a special circumstance that contributes to justifying the requested variances, which are intended primarily to allow the existing buildings to be retained as they are currently situated on the subject property.
- c. Strict application of the Zoning Ordinance would prevent the subdivision of the subject property in a manner that allows the existing buildings to be retained, which includes an historic home that is considered to be very worthy of preservation.
- d. There is no intent with this redevelopment project to circumvent any requirement of the Zoning Ordinance, as evidenced by the fact that the only physical alterations proposed are to comply with subdivision regulations (removal of loading dock roof) and to replace paving with grass and other landscaping.

This recommendation of approval is made subject to the following conditions:

1. The property shall be developed in accordance with the submitted application and site plan, subject to additional landscaping and pavement removal for lot 1 per condition #4. Pavement removal and parking lot improvements on lot 2 shall be completed only in accordance with the action of the Division of Historic Preservation/Board of Architectural Review, within one year after recording of the subdivision plat.
2. All necessary permits shall be obtained from the Division of Building Inspection prior to any demolition, renovations, fence construction and pavement removal.
3. All exterior work on the subject property shall proceed in a manner that complies with requirements of the Division of Historic Preservation and the Board of Architectural Review.
4. A pavement removal/landscaping plan for lot 1 shall be implemented, subject to approval by the Division of Historic Preservation/Board of Architectural Review. At the minimum, this plan shall indicate (a) the provision of a 3' or wider landscape buffer along the westerly side property line from W. Short Street to a point no more than 30' from the detached garage, and (b) a grassed/landscaped area of at least 1,500 square feet directly in front of the residence. All pavement removal and landscaping shall be completed within one year after recording of the subdivision plat.

Since there were a number of objectors to this appeal present, Chairman Stout wanted to hear their comments first. However, Mr. Simpson asked to hear the appellant's presentation first, since he had not had the opportunity to meet with them to discuss this appeal.

Representation – Mr. Timothy Zeff Maloney, owner of Sable Holdings, was present. He stated that he purchased the subject property a few years ago on speculation; and that Jon and Lisa Cox had asked him to apply for the variances that are being requested. He said he supported the Coxes and would let them explain their proposal to the Board.

Ms. Lisa Cox was present and spoke. She initially told the Board that there were a number of persons who supported them verbally, but they were not present due to a conflict of interest. She stated that she

and her husband are under contract to purchase the property at 615 – 617 West Short Street; and that they currently live downtown and own/operate a successful small business, which they have done for about three years. She said they have been working with Mr. Maloney, as well as the Divisions of Planning and Historic Preservation for several months trying to find a solution for the problems involved with the restoration of the unique and beautiful building at 615 W. Short and the business use at 617 W. Short. She said it was their goal to separate the business and residential aspects of this property in order to secure bank financing, as the letter from their mortgage broker indicated. She said the upholstery business on the property is a legal nonconforming use that has been operating since the 1950s; and as such, it must remain the same type of business or be a less intensive use, according to the zoning regulations. She spoke of their plans to leave the business use intact but slightly reduce the parking, and to restore and live in the historic house, including removing the blacktop and installing lawn and landscaping to beautify the property, as well as changing the exterior appearance of the cinder block garage to make it aesthetically pleasing.

Ms. Cox spoke about the rendering that was furnished showing the property as it currently exists, as well as the proposed changes that were described. She noted being perplexed by the opposition from the neighborhood association and exclusion from neighborhood meeting(s) because they are not the actual applicants for the variance(s) being requested. However, she reiterated that they are under contract to purchase the property from Mr. Maloney. Further, they felt the reception from the neighborhood had been hostile and there was no spirit of compromise. She said the neighbors' argument seems to be about the future of the upholstery business on the property and how subdividing it from the residential use will impact other properties in the neighborhood.

Ms. Cox believed that she and the neighbors had the same objective – to restore a beautiful historic house that, at present, is not habitable; and although there have been other prospective buyers, the huge difficulties they faced scared them off, which is why Ms. Cox believed that they were the last, best hope for the historic home. She said if the variances are not granted, they would be unable to get financing and the house probably would continue to decline and fall into disrepair. However, if the variances are approved, they already had a contractor and crew available to start the necessary work. In closing, Ms. Cox asked for the Board's favorable consideration of the requested variances.

Supporters - Mr. Chris Hoff was present to speak in support of this project. He said he was asked by the Coxes to oversee the hiring of contractors for the work that is to be done on the building, noting his years of experience with the restoration of several historic houses in the neighborhood and his involvement with the Atomic Café and Doodles restaurants. He said he would be in charge of the renovation and would make sure that the historic aspect of the house is kept intact.

Mr. Case Davis, president of Beaver Creek Hydrology, was also present in support. As a friend of the Coxes, he expressed how excited they were to take a historic home in downtown Lexington and refurbish it to live in. He commented about the amount of work that was needed after having seen the house, but noted that the Coxes had a good vision for what could be done with it.

Staff Report - Chairman Stout asked to see the photos of the subject property and for any comment from staff.

Mr. Marx stated that he thought there was a mixture of both confusion, on the part of the neighborhood opposition, and concern with respect to whether or not the subdivision of this property would somehow encourage the continuation of the nonconforming use. However, in the staff's assessment, they didn't think it was reasonable to try to predict with any certainty whether or not the subdivision would either encourage or discourage the continuation of that nonconforming use. He said the staff felt that, if anything, the subdivision of the lot would discourage the continuation of the nonconforming use because of the parking situation, as referenced in the staff report; and it would be a much more restricted situation with respect to the parking if the lot is subdivided. He noted that right now, the business use kind of overflows into the residential portion of the property; but under the new arrangement, there would be a physical boundary between the two lots with respect to the parking situation. He said in the staff's mind, the subdivision would discourage the continuation of the nonconforming use.

Mr. Marx noted another thing that was not mentioned in the staff report with regard to the possible conversion of the nonconforming commercial use into a residential structure. He said, with the

subdivision of the lot, it would be entirely feasible to tear down the commercial building and construct a conforming residential, single-family detached structure that complements the way that neighborhood has developed because the lot frontage there is comparable to other lots along that block of W. Short Street. He said this was one available option that would actually encourage the discontinuation of that nonconforming use. However, he said the staff was aware of the neighborhood's concern about the continuation of the nonconforming use with the subdivision of the property and was interested in hearing why the neighbors felt so strongly that this is going to happen.

Ms. Cox presented the rendering to the Chairman, which illustrated the changes that were proposed for the property at 615 – 617 W. Short Street.

A photo showing a frontal view of the historic residential structure and the commercial structure on the lot was displayed on the overhead.

Board Questions - Chairman Stout asked about the portion of blacktop that is to be removed. Ms. Cox said it is primarily the asphalt area in front of the residence that currently is being used for parking for the adjacent upholstery shop. This area will be removed in order to install lawn and landscaping to beautify the property. He then asked about the structure at the rear of the residence. Ms. Cox replied that it is a cinder block garage that they want to refurbish to make the exterior blend in with the other buildings. After further inquiry, the Chairman determined that there are residential properties located on both sides of the property in question.

Mr. Cox responded, when asked by the Chairman, that the commercial building was constructed in the 1950s and the residence in 1890. Ms. Cox added that it was all legal when it was built – a mixed use family business, which this neighborhood is known for; and that they were only going to make it less obtrusive to the neighbors with landscaping, to make a clear division, and restrictive use of the parking.

Ms. Meyer asked whether the Coxes had met with the neighborhood association or any of the neighbors present to explain what they are proposing. Ms. Cox responded that they would have liked to, but were unsuccessful in their effort. She said they had met with mutual friends to try and broker a meeting, to no avail, because the neighbors didn't consider them as the actual applicant, despite being under contract to purchase the property; and that a neighborhood meeting with them was discouraged at every turn.

Mr. Maloney added that he was invited to a meeting with the neighbors, many of whom he knew, but it didn't go well. At the end of the meeting, he said did ask if they would like to invite the Coxes, but they declined. Ms. Meyer related her understanding that the neighbors had not seen the rendering or any of the plans for this project. Mr. Maloney responded that he wasn't sure. Ms. Cox stated that they had not seen the rendering that was shown to the Board, but that she had been in contact with Bill Johnston via e-mail regarding their proposal.

Chairman Stout commented that he found it strange that the neighborhood association wouldn't invite the Coxes, to hear what they were trying to do. He said, normally, the applicant and the neighborhood association try to work together on these appeal matters; and that he was anxious to hear why the neighbors wouldn't accept the Coxes in their meeting so they could explain the project.

Opposition – Mr. Bruce Simpson, attorney, was present on behalf of the Historic Western Suburb Neighborhood Association. An exhibits book was distributed to the Board. Mr. Simpson said there were a number of persons who had shown up in connection with this appeal, some of whom are members of the neighborhood association, the presidents of other neighborhood associations in downtown Lexington and the Bluegrass Trust for Historic Preservation.

Mr. Simpson stated that Mr. Bill Johnston, president of their neighborhood association would explain to the Board his position about meeting with the applicant in this case. He said that a meeting with the applicant/owner of the property, Sable Holdings, did take place for about an hour; and that Mr. Maloney explained his intent with respect to the property, and what the prospective buyers were proposing. He also said the notion that the neighbors were not interested in meeting with the Coxes was a smoke screen for what was being asked -- to finesse the Zoning Ordinance and the Subdivision Regulations for a continuation in the future of a nonconforming use, a nonconforming lot

and a nonconforming structure.

Mr. Simpson stated that Mr. Maloney purchased the property in question in March 2010, with the intent of preserving the business. Subsequently, an offer that was \$60,000 over the purchase price was made by one of the representatives of the neighborhood in order to keep it as a residential property; however, Mr. Maloney declined the offer. He said that Mr. Maloney and the prospective buyers were present to seek a subdivision of this property for the purpose of sale; and the justification for the subdivision of this property was because they need financing, which is what Mr. Maloney represented to the board at the neighborhood meeting. Mr. Simpson said there is no provision in the Zoning Ordinance or the Subdivision Regulations that talks about an exception in order to get financing for a property that has an historic house. Reference was made to an exhibit distributed earlier to the Board, which documents that the house, built in the late 1800s, is on the National Register of Historic Places. An addition was constructed in the 1950s, when the property was zoned B-4. In 1969, all the properties in Fayette County were rezoned, at which time this property became R-4. Mr. Simpson said since the early 70s, the neighborhood has changed radically from what it used to be, and the property owners have invested millions of dollars throughout this area to revitalize it. He went on to say that the neighbors were not there because they were against the applicant or the prospective buyers, but rather because of what they see as an impermissible subdivision of property and a request for a variance that is merely an accommodation for a prospective purchaser to seek financing.

Mr. Simpson said he would review the policies that have been established by law, including a KY Court of Appeals case, which strongly disfavor continuing nonconforming uses; and that two realtors who would testify that, by subdividing this property, it was more likely that the house would be devalued with respect to its historical residential use; and it was more likely that the freestanding lot, where the upholstery shop has done business for 50 years, will remain because it can be conveyed fee simple. Further, they would testify that if the existing property is left on the market, someone will tear down the addition where the upholstery shop is located and transform that lot into a single-family residence consistent with the character of the rest of the neighborhood in the 600 block of West Short Street.

Reference was made to Tab #12 in the exhibits book that showed the subdivision plat approved by the Planning Commission for 615 & 617 West Short Street. Of note was the minimum lot size requirement of 6,000 square feet in the R-4 zone and the zig-zag configuration of the lot line separating the historic residential structure from the adjacent nonconforming commercial structure. Mr. Simpson opined that if the requested variances are approved, it will encourage the business use to remain. Mr. Simpson reviewed the requested variances that are necessary in order to subdivide the property. He reiterated that the Board would have to "give their blessing" which, in his judgment, cuts against the policy of not encouraging the continuation of nonconforming uses.

Reference was made to Tab #4 showing an aerial view of the entire property, including the historic residential structure, the upholstery shop and other structures. Mr. Simpson reiterated about the lot configuration that resulted from subdividing the property, which is not a straight line like most subdivided lots but instead is a zig-zag configuration. He said that the Coxes could buy the property today, live in the house, and the business could continue without subdivision; however, it was their position that approval from the Board of Adjustment, the Planning Commission and the Board of Architectural Review was necessary in order to get financing, which Mr. Simpson continued to dispute.

Mr. Simpson noted two issues in the staff report that he wanted to address, the first of which was the statement that the (commercial) building is not connected to the residence. In point, Mr. Simpson referenced Tab #2 and the two photos that clearly showed that the buildings are adjoined. The second issue was regarding the proposed reduction in the on-site parking. Mr. Simpson referenced the photos under Tab #5 and Tab #6. The first photo taken on November 4 showed 9 cars in the parking area. The second photo taken on November 17 showed 8 cars and a trailer in the parking area. Mr. Simpson said that Mr. Naylor, who lives next door, has observed at least 7 cars parked on the property at any one time. He said the number of parking spaces will be reduced to 3, but the average is 7; and that the staff believes the three spaces are adequate to accommodate the business.

Mr. Simpson referenced Tab #1, which showed several photos of the homes along West Short Street, to illustrate the historic and residential nature of the neighborhood. He noted that none of these property owners came to the Board seeking a subdivision of their property to allow any of the previous nonconforming uses that existed in the 50s, 60s and early 70s, which faded out. He said the neighborhood bought some of these properties and later sold them, on the condition that the purchaser had to build a single-family home. He said, of the addition to the home on the subject property, that there was nothing historic about it; and there was no policy that encourages its preservation. He further stated that if the Board approved this subdivision of the property, they are approving (benignly or directly) the future perpetuation of a non-historic structure in an historic zone, which was another reason to deny the variance.

At this point, Mr. Simpson made reference to Tab #7, which showed the resume of Mr. Mark Naylor, landscape architect and property owner at 609 West Short Street. He said Mr. Naylor would share his experiences of living in the neighborhood, the parking situation on the subject property and his concerns about the appellant's proposal.

Mr. Naylor introduced himself and spoke about the meeting with Mr. Maloney and how the lack of details in his presentation left the neighbors feeling uneasy. He said, among the variables, the neighbors were told that Mr. Maloney would provide financing for the developers; and if something didn't work out with the upholstery shop, it might be used by Mr. Maloney for the storage of antiques. It was noted that there were no drawings or renderings presented when Mr. Maloney met with the neighborhood representatives. Mr. Naylor felt that calling the neighbors hostile and saying they were unwilling to meet was not true.

Mr. Naylor proceeded to address the parking issue, noting that the photos shown earlier to illustrate the average number of cars parked at Bluegrass Upholstery on a daily basis were taken within the last two weeks. He said, as a next door neighbor, that he had not had a problem with Bluegrass Upholstering and had always gotten along with them. Referring to the photos that were displayed, he said, in his observation, that the number of vehicles parked on the property at any one time could not be accommodated by just the two proposed spaces.

Mr. Simpson asked if Mr. Naylor was in attendance when Mr. Maloney, the owner of the property, came to speak to the interested neighbors; and whether, in connection with the discussions, Mr. Maloney spoke about providing an easement through the residential property to serve the adjoining upholstery shop. Mr. Naylor responded affirmatively to both inquiries. Mr. Simpson then asked whether Mr. Maloney explained how the access easement would work, and why it was needed. Mr. Naylor responded no, but added that Mr. Maloney did provide a sketch, upon request, to illustrate the configuration of the easement. Reference was made to Tab #10, which showed a re-creation of the property plat and illustrated how the access easement would extend from the front of the residential portion to the rear of the adjoining commercial portion. Mr. Naylor said it was his understanding that the access easement would allow the upholstery shop to receive deliveries, etc. at the rear where the overhead doors of the commercial building are located. He reiterated that no drawings or renderings were available to illustrate the proposal Mr. Maloney spoke about at the meeting.

Mr. Simpson asked Mr. Naylor about his background and experience. Mr. Naylor responded that he is a registered landscape architect and for the past 25+ years has worked primarily in commercial design, including parking lot designs, fitting buildings on sites, storm water retention, etc. Mr. Simpson then asked Mr. Naylor to address the building code issues related to the property in question, with respect to a commercial building next door to a residential structure. Mr. Naylor spoke about the application of the building code for commercial and residential structures. He said the code is very specific about the need for fire walls based on the proximity of the two uses; and in this case, it would be necessary to install a two or three-hour fire wall between the two uses, which the Fire Marshall would dictate.

Mr. Hume said he didn't think they should be anticipating what the Fire Marshall or building code plan reviewer is going to do; and that it was all speculation, considering that there are no plans or formal applications on this. He said this may fall under a completely different chapter known as Chapter 35 of the Code; and that he was not sure whether Mr. Naylor was qualified to give this scenario.

In response, Mr. Simpson explained that the significance of Mr. Naylor's testimony was the impact on

an historic structure in order to comply with the building code. He noted Mr. Naylor's long-time experience in doing these kinds of assessments, drawing up plans and working with the Fire Marshall.

Mr. Naylor addressed Mr. Hume's concern, saying that he was in no way trying to usurp Building Inspection or the Fire Marshall; but as an adjoining property owner, he was concerned about the impact of putting a new property line between the historic structure and the attached commercial building. He noted that the building code has restrictions regarding openings and windows in proximity to a property line; and there was concern about what will happen to the windows of the historic structure in relation to the proposed property line between the buildings.

Under Tab #11, a rendering provided by Mr. Naylor was shown of the subject property's appearance without the upholstery shop use. Mr. Naylor commented about the number of years it has taken not only to renovate/restore the historic homes in the neighborhood, but to eliminate the nonconforming uses on those properties as well – which is the ultimate goal. A photo was shown to illustrate how the easement proposed by Mr. Maloney would wrap around the residential structure and extend to the rear of the upholstery shop for service. Photos also were shown of Mr. Naylor's property at 609 West Short Street, which is directly next door to the upholstery shop. Mr. Naylor noted his previous experience with the renovation of other historic homes in the neighborhood, including his current residence. He also spoke about the unintended consequences of granting the requested variance that would reduce the side yard setback (to zero) along the side of the building adjacent to his home. For illustration, a photo was shown of the interior of Mr. Naylor's kitchen. He said there are two windows that potentially would be blocked if the nonconforming use ceases, the building is removed, and a new structure is built in its place.

Ms. Boland pointed out that the purpose of the variances is to allow the structures to remain as they are; and that the variances, if granted, would not allow additional construction to the zero property line or the front setback, because the conditions on the variance would be that they comply to the site plan that has been submitted to the Board today. Further, it would not justify anything beyond what the site plan shows. Mr. Simpson replied that they were not contending that approval of these variances would allow future construction that would go in that direction, but rather that it would legitimize the subdivision plan that allows for a freestanding commercial lot.

Mr. Jim McKeighen, realtor with Turftown Realty, was present. He indicated that, for 24 years, he has facilitated the sale of residential and commercial properties, specializing in the downtown neighborhoods. Regarding the assessment of this property for potential residential use, he opined that the business use would not go if the property is subdivided; and that if someone desired to return it back to its original configuration, it could be impossible if they didn't own the business lot. He said trying to sell it and renovate it for residential purposes would be very difficult with the separate business lot next door; and it would tremendously devalue the existing house. He reiterated the strong likelihood that the subdivision of the property would perpetuate the nonconforming use at 615 W. Short Street. Mr. McKeighen briefly spoke about the history of the property, including when the home was constructed and the building addition that was constructed in the 50s. He opined that the upholstery shop had no historical significance, as opposed to the Italianate house.

Mr. Bill Johnston, president of the Historic Western Suburb Neighborhood Association and resident at 645 West Short Street, was present. He stated that initially they had no idea that the subject property was being subdivided, or that a proposal to do so had already been to the Planning Commission for consideration. After they became aware of this, he said they met with Mr. Maloney, the applicant, regarding the subdivision of the property and the proposal related to it. Mr. Johnston stated that he had spoken with a neighbor who knew the Coxes very well; however, he said they felt they needed to deal with the person who had filed the application and it didn't make sense to talk to the Coxes at this point in time. He noted, however, that his phone number was provided for anyone who wished to contact him.

Mr. Johnston said a lot of the neighbors present had worked very hard to make this neighborhood rise from the depths of near demise to what it is today; and that the people who actually saved the Western Suburb some 30 years ago moved into the area at a time when the city was parking its fleet of garbage trucks in the heart of the neighborhood, or about a half-block from the subject property.

A collection of three photos was shown for illustration. Also, a collage of photos was shown to illustrate the dilapidated condition of a number of properties in the immediate and surrounding area prior to being renovated, as well as after being beautifully restored by the property owners. He then spoke about the upholstery shop addition to the historic residential structure, of which photos were shown. He said when the neighbors heard the property was being subdivided, they were concerned for many reasons. It was noted that they had no problem with the property being one parcel; however, the subdivision of the property was an issue, for the following reasons: 1) it is not logical; 2) it encourages the survival of a nonconforming use; 3) it damages the value of the old house; and 4) it perpetuates the mistake made in the 60s. A rendering of the property was shown to illustrate the appearance of the historic residential structure without the upholstery shop addition. He said now what was being contemplated was a significant alteration of the history and historic character of this property in order to accommodate an existing building addition that they all agree should probably not have been put there in the first place. He felt that the variances should not be approved and the property should not be allowed to be subdivided.

Discussion - Mr. Hume asked staff whether the upholstery business would exceed the maximum allowance for lot coverage if a new (nonconforming) lot is created. Mr. Emmons responded that when the proposal for the subdivision of the property went before the Planning Commission, an analysis by staff was done of those things that could be varied by the Board, as well as those that could not, such as the minimum lot size, lot coverage and the floor area ratio. He said the proposed subdivision of the property did meet all of the minimum requirements, which allowed the Planning Commission to recommend approval of the subdivision of the property, subject to the Board's decision on whether to grant the variances of the setback requirements. He also explained why approval from the Board of Architectural Review (BOAR) was necessary, since one of the proposed lot lines would be going through a shed roof on the property, which would need to be removed. He went on to say that if the variances should be approved by the Board, the applicant would have to go back to the BOAR in order to get approval of the reduction in the amount of asphalt, in agreement with the site plan submitted to the Board.

Chairman Stout related his understanding that the Planning Commission approved the subdivision of this property. Mr. Emmons responded that they did approve the subdivision of the property subject to the Board's approval and other conditions.

Mr. Griggs asked whether notice was given regarding the subdivision of the property. Mr. Emmons replied that the subdivision of property does not require any notice; and that it is a ministerial act under State law. He said if a property meets the requirements for subdividing, the Planning Commission is bound to approve it. A brief discussion followed.

Ms. Moore asked whether the two buildings would remain intact when the property is subdivided. Referring to a submitted photo showing the structures under discussion, Mr. Emmons explained the configuration of the lot line that would go through the common wall of the two structures and continue through the shed roof, which is proposed for removal. He related the staff's understanding that there are two exterior walls that are butted up against each other.

Referring to the photo under Tab #2, Mr. Stout said it appeared that the house and the upholstery shop are connected. He asked whether the buildings are separated or not. Mr. Griggs commented that he thought it was pretty obvious that the clay tiles on the upholstery shop go right into the bay of the old house; and that the two structures share a wall there. In response, Mr. Emmons said whether the structures share a wall or not, there is a proposed lot line through there, not unlike a duplex split where there are two separate units and a common wall.

Chairman Stout asked if, in the staff's opinion, the attachment is irrelevant. Mr. Emmons responded affirmatively.

Opposition (Cont.) - Mr. Foster Pettit, 316 W. Second Street, was present to speak to this appeal. He said he purchased this commercial piece of property and built his house on it; and that he has been involved in commercial real estate since 1965. He spoke about his personal experience with renovating old houses and the related expense, but also the rewards for having done so. Mr. Pettit said he believed that if the variance request is granted, it would likely create a situation where the

nonconforming use is continued for some time. He also advised the Coxes, who propose to buy the property and fix it up, that it would take a lot of time and money; and that he wasn't sure that having a commercial property next door would add to the value of the residential property if they ever wanted to sell it. Mr. Pettit said he appreciated that they wanted to preserve this property; but he felt it was a mistake for all parties concerned to grant the variances.

Ms. Linda Carroll, president of the Bluegrass Trust for Historic Preservation and a 30-year resident of the Mulberry Hill Historic District, was present. After referring to a letter that was sent to the Board earlier, she stated that the neighborhood was platted in 1815; and that this was a single lot for 196 years. She said, in a ministerial act that took a matter of hours, the property was subdivided without any public input. She said if the variances are granted, the subdivision of the property will stand; and it will likely encourage the continuance of the nonconformity. Ms. Carroll urged the Board to deny the variance request.

Mr. Phil Points, 424 W. Sixth Street, was present. He stated that he has lived there since 1964 and was deeply involved with the Northside Neighborhood Association. Speaking on his own behalf, Mr. Points expressed his support for the position of the Western Suburb neighborhood. He felt that approval of the variances, which would allow the subdivision of the property, was a mistake.

Mr. Bill Barr, 404 North Limestone, spoke to this appeal. He said he was not present to speak on behalf of historic preservation, although the historic structure at 617 W. Short clearly was worthy of preservation. He also said it was clear that Article 4-2 of the Zoning Ordinance is controlling in this matter because it states, in part, that it is not the intent of the Zoning Ordinance to encourage the survival of nonconforming uses. Mr. Barr related his concern that the proposed subdivision, which isolates the existing nonconforming building and lot, will motivate future owners of this parcel to perpetuate its nonconforming use indefinitely, in contradiction to Article 4-2. He asked the Board to deny the variances and apply the law as it has been adopted.

Mr. William Findley, 623 West Short Street, was present. He stated that he purchased this property in January 2006 and moved into the home after renovations were completed in May 2006. He noted being aware of the commercial building to the east when they purchased this property; and that they were assured by their realtor that its continuance was temporary and would be discontinued in five years or so, at which time the property would revert solely to residential use. Mr. Findley spoke about the proposed subdivision of the property into two parcels, for which the purpose was to enable the prospective buyers to continue the existence of an intrusive commercial establishment in perpetuity and to continue the cash flow that was necessary to help finance the restoration of the historic house. He spoke about the number of years it has taken the property owners to turn a former slum area into a delightful residential area adjacent to downtown. He felt that approving the proposed variances will permanently change the unique character of this neighborhood, diminish prospective property values, and encourage the continuance of the nonconforming use for the foreseeable future. The Board was urged to reject the proposals presented to them.

Ms. Elloree Findley, 623 West Short Street, was present. She proceeded to read, for the record, a letter of opposition in its entirety from neighbor Meg Smith at 624 W. Short Street (directly across the street from the subject property), who was unable to attend today's meeting because of a previous commitment. The comments were directed to: the extensive renovations that were made to the property purchased by Ms. Smith, where a duplex formerly existed; the process involved with getting BOAR and Board of Adjustment approval; the out-of-place cement block commercial building attached to the historic house, which is a detriment to the neighborhood; the purchase of the property (at 624) and the subsequent investment that was made in reliance on the representation that the commercial property would eventually revert back to solely residential use; the remarkable transformation of the properties in this block over a number of years; and the continued efforts of the residents to preserve the historic nature of the neighborhood. In closing, it was expressed that approval of the subdivision and variance proposals would do anything but improve the neighborhood. Ms. Findley thanked the Board for their time and attention.

At this time, Mr. Simpson responded to the question that was raised regarding the Planning Commission's action on this matter before it came to the Board. He said he has been practicing law in these cases for 20 years; and one of the things that troubles him greatly is when the public is not

informed about meetings in which the government makes decisions. Referring to Tab #12, he said, in the case of the Planning Commission, they adopted the zig-zag configuration shown to accommodate 6,000 square feet in order to have a freestanding lot that could be sold. He said the reason, as explained to him, is that this is a ministerial act; and the decision is based upon the Planning Commission's judgment that this is in conformance with the regulations and the Zoning Ordinance, which implies that they don't make mistakes. However, in this case, he felt the Planning Commission erred when they approved a subdivision of property that did not conform with the land Subdivision Regulations, shown under Tab #15, from which the following excerpt was read: "Pointed or very irregular shaped lots shall be avoided where possible." However, the proposed configuration was approved by the Planning Commission; and, in the absence of any public input or review, this item was placed on the Planning Commission's consent agenda.

Mr. Simpson also spoke about the critical importance of the Board's decision. He said, in order to complete the proposed subdivision of property, approval of the requested variances would be necessary; but if the variances are denied, the subdivision becomes unenforceable. He stated that there was no harm to the applicant in denying the variances, because he still would have a lot with a residence, as well as a commercial business that can continue to exist as a nonconforming use for as long as he wants to own and maintain it in that manner. He reiterated that there was nothing in the Zoning Ordinance that says, because you can't find the right lender in order to buy this property, you're entitled to subdivide it by going through the Planning Commission with this gerrymandered lot configuration and subsequently coming before the Board of Adjustment seeking exceptions to the setback (down to zero) in order for you to subdivide it and own it.

Mr. Simpson referred to Article 4-2, under Tab #14, and read the following excerpt: "It is intended that nonconformities shall not be enlarged or extended beyond the scope and area of their operation at the time of the adoption of this Ordinance." He said nonconformities, whether nonconforming uses or nonconforming lots, are not to be encouraged for long-term survival and are not favored. In point, a KY Court of Appeals case was cited, under Tab #18, which evaluated the policy of nonconforming uses. Mr. Simpson read the following excerpt: "The policy and spirit of the zoning law of this State ordains the gradual elimination of nonconforming uses, and the general intent of zoning ordinances dealing with the subject matter is to hold nonconforming uses within strict limits." He said they are asking the Board not to enable, through the approval of these variances, the subdivision of land which will allow this nonconforming use to go forward. He reiterated that there was no harm to the applicant if the Board turns down the variances because Mr. Maloney can still own the property and Bluegrass Upholstery can still operate. However, if the property is subdivided and the Board approves these variances and gives blessing to what the Planning Commission did, without public input or review, then the nonconforming use can go forward in perpetuity, which is not encouraged and not allowed by the laws of the Commonwealth. Based upon the facts in this case, the testimony and the law, Mr. Simpson respectfully asked the Board to deny the requested variances.

Rebuttal – Mr. Maloney apologized for all the problems this has caused; and said that the Coxes were great people. He said he thought it was kind of funny that everyone was saying this is a residential neighborhood, when there are four corners of the 600 block of W. Short Street where business uses are located.

Ms. Cox stated that she had learned a lot today. She felt that what the neighbors were not really paying attention to was the fact that not only could they sell this lot, but they could possibly sell it to a neighbor that desires having a larger lot. She said they eventually wanted to see the commercial building gone as well; and that they would like to have the opportunity to do what the neighbors who spoke earlier had done -- which is to buy a rundown building and turn it into a livable home. She said that a lot of thought was put into making the decision to purchase this property, including weighing the financial consequences; and that they would have to deal with the related issues as well. Ms. Cox acknowledged that the income from the business would help to finance the restoration of the house; and the business use was something they would have to deal with for a little while longer. She said according to the zoning laws, it will be a diminished use and the parking will be more restrictive.

Referring to the photos shown earlier to illustrate the on-site parking situation, Ms. Cox stated that

one of the cars was inoperable and needed to be removed; and that their trailer was parked on site with Mr. Maloney's permission. She said she didn't know if a count was taken to determine whether the vehicles parked there actually belonged to customers of the upholstery shop; however, she reported her observation that the lot is used on occasion by neighbors for off-street parking purposes.

Mr. Griggs related his understanding that the income generated from the upholstery shop would help with the restoration of the house. Ms. Cox replied that was correct. Mr. Griggs asked about the possibility of getting financing without subdividing the property. Ms. Cox responded that according to their mortgage broker, they could not get a home loan because of the nonconforming business on the lot. She said, if they were to leave it as one parcel, assuming they could get financing for it, they still would be asking for the variances in order to remove as much asphalt as they wanted.

Mr. Cox reiterated that if the variances are not granted, they can't remove the asphalt. He said even if they purchased the property without subdividing it, they would still need the variances in order to have the yard they desired. He said they wanted to make this place beautiful; and that they would love to tear the upholstery building down, but it would have to stay there until the restoration of the house was done.

In response, Mr. Simpson stated that if they wanted a variance to tear up the asphalt and put in a lawn, they could do that; but they didn't need to subdivide the property to make that happen.

He said there is nothing in the findings that the Board has to make (in order) to grant a variance that provides any relief for any applicant to say they can't find a lender, or the lender they've gone to won't approve the purchase of this property. He said a hardship is not being created for the Coxes because they don't own the property; and that Mr. Maloney, the property owner, bought it knowing the structures are joined together at the roof. He said even if the property is subdivided by approving the variances, the structures will remain joined at the roof, which will perpetuate a use that was never intended after 1969; and which has never existed in this neighborhood because people bought those lots and made them single-family residential in nature. Mr. Simpson said if the Board follows the law under variances, which is set forth in every decision they have to make, they cannot make any finding based upon the evidence in this case thus far that approves these variances.

Board Questions - Mr. Griggs asked if Mr. Simpson had findings of fact that would support his argument. Mr. Simpson responded that he did, under Tab #19.

Chairman Stout asked Mr. Simpson who was operating Bluegrass Upholstery. He responded that the people who own it do.

Chairman Stout asked Ms. Cox about the lease extension for the business, if they purchase the property. Ms. Cox said that was yet to be negotiated, but they would offer Bluegrass Upholstery a lease extension. She reiterated that the income from the upholstery business will help to finance the restoration of the house.

Chairman Stout then asked Mr. Maloney about the length of the business agreement; and whether it would be renegotiated. Mr. Maloney said the lease for Bluegrass Upholstery is month-to-month, and it is owned by Mike McKenzie. He said he hadn't renewed the lease because he wants to sell the property, and it wouldn't be fair to the prospective buyer if he did.

Chairman Stout asked staff for comment. Mr. Marx said he thought a lot of the information that had been presented was not relevant, such as the reason the Coxes wanted to go through the property subdivision; their financial challenges; the marketability and diminished values of properties (which is speculative); the issue of the buildings being partially attached; the focus on the parking variance; the easement extending from Short Street back to the rear of the property (which is pretty much a continuation of how the business currently operates); concern about a two-story addition immediately adjacent to one neighbor's property (which is unlikely considering the way the variance request was structured and recommended for approval); and the front yard reduction from 20 feet to 5 feet (which, based on the site plan, is unnecessary and withdrawal is recommended by staff).

Mr. Marx pointed out that subdivision of the property could happen without the parking variance; and the practical implication is that more asphalt would remain on the commercial lot. He said there is sufficient room there, in terms of the existing pavement, to put in the 5 required parking spaces. He said there still was a lot of uncertainty about whether or not the subdivision would encourage or discourage the continuation of the nonconforming use. However, he encouraged the Board to focus on what is certain, with regard to the proposal for the residential structure -- removing most of the pavement and making it a lot more presentable from the street, in terms of being residential and not commercial. With respect to the case that Mr. Simpson cited regarding the continuation of nonconforming uses with stricter limits, he said, in the staff's opinion, that is what will happen with the subdivision. He explained that it will be a much stricter situation for the nonconforming use to continue with the subdivision, partly because the parking arrangement will be much more confined. He noted that the business use overlaps quite a bit into the residential use, which can't happen with the subdivision. Mr. Marx offered the staff's assistance in reviewing the findings submitted by Mr. Simpson, if the Board wished.

In response, Mr. Simpson reiterated about there being no public input or discussion on this when it went to the Planning Commission, because the government determined "they knew best." He opined that a mistake was made and asked the Board not to duplicate it. Mr. Simpson said that Mr. Marx was trying to justify the staff's position, which he appreciated; but in this case, there was no evidence to justify the findings the Board has to make for this variance as a matter of law. He reiterated that there was no hardship to Mr. Maloney, who had offered no testimony; and that the prospective buyers are not the applicant in this case, but rather Mr. Maloney (Sable Holdings), the developer. He related the Coxes' intent to keep the upholstery business going as long as they can and flip it to someone else. In closing, he said, based upon the law, the Board has to deny this application, and they could pick and choose the applicable findings they wished to make, with Ms. Boland's assistance.

Mr. Griggs requested a short recess to allow the Board to review the submitted findings with counsel and staff. The Chairman concurred.

(The meeting was recessed at 3:46 p.m., and reconvened at 3:55 p.m.)

Chairman Stout called for a motion at this time.

Action – A motion was made by Mr. Griggs to deny **V-2011-77: SABLE HOLDINGS** (variances to reduce: (a) the required lot frontage from 50' to 35'; (b) the minimum front yard from 20' to 5'; (c) the minimum side and rear yards from the required setback of each to 0'; (d) the usable open space from 20% to 0%; (e) the required parking from 5 spaces to 3 spaces; and (f) setbacks for the existing accessory building from 1.5' to 0' in a High Density Apartment/Historic District Overlay [R-4/H-1] zone on property located at 615 – 617 W. Short Street) based on the following findings:

FINDINGS FOR DISAPPROVAL

1. Granting the variances will allow an unreasonable circumvention of the Zoning Ordinance because the need for the variances is entirely self-created.
2. The strict application of the provisions of the regulation would not deprive the applicant of the reasonable use of the land or create a hardship on the applicant because the applicant could still continue the operations of the upholstery shop as well as use the residence.
3. The applicant purchased the subject property in March 2010 and therefore knew or should have known of the restrictions and constraints regarding the subdivision of property and variances which would be required. Thus, the applicant had to be aware that such governmental approval might be denied before he purchased the subject property.

Discussion - Mr. Stumbo commented that this was a very difficult decision for all the Board members present; however, he said, at the end of the day, he was unable to support the requested variances. He said that he sympathized with the Coxes who were working very hard to get financing and hoped there were other avenues or alternatives they could pursue to be successful in purchasing the

property. He spoke to the number of residents from this historic neighborhood that were present and what they had done, in terms of the vast improvements, with the Western corridor. Mr. Stumbo said, as long as it meets the criteria of the law and there are supportive findings, he tends to side with the neighborhood, because if he lived on Short Street, he also would be concerned. He seconded Mr. Griggs motion.

Votes were as follows:

Ayes: Meyer, Griggs, Stumbo, Stout

Nay: Moore

Absent: White, Glover

The motion for disapproval carried, 4 to 1.

Chairman Stout thanked everyone for coming to express their concerns and their support.

D. **Conditional Use Appeals**

None Remaining

E. **Administrative Review**

None Remaining

IV. **BOARD ITEMS** - The Chairman announced that any items a Board member wished to present would be heard at this time. There were none.

V. **STAFF ITEMS** - The Chairman announced that any items a Staff member wished to present would be heard at this time.

A. **2012 Meeting and Filing Schedule** – Mr. Marx stated that the Meeting and Filing Schedule for 2012, in draft form, was presented to the Board previously for review and asked for their consideration of adoption.

Action – A motion was made by Ms. Meyer, seconded by Mr. Stumbo, and carried unanimously (White, Glover absent) to adopt the 2012 Meeting and Filing Schedule.

B. **Landscape Review Committee** – Mr. Marx informed the Board that the term of Karen Angelucci, Tree Board member of the Landscape Review Committee, would expire on November 30 of this year; and that she had agreed to be re-appointed for another four-year term. The names and terms of the current Landscape Review Committee members are as follows:

<u>TERM</u>	<u>NAME</u>	<u>REPRESENTING</u>
Term on BOA	Jim Griggs	Board of Adjustment
11/30/2013	Mr. Louis Hillenmeyer, III	Nurseryman
11/30/2014	Mr. Richard Weber	Landscape Architect
11/30/2011	Ms. Karen Angelucci	Tree Board
11/30/2012	Mr. Mike Cravens	Lexington Homebuilders

Mr. Marx asked the Board to consider the re-appointment of Ms. Angelucci to the Landscape Review Committee at this time.

Action – A motion was made by Mr. Stumbo, seconded by Ms. Moore, and carried unanimously (White, Glover absent) to re-appoint Ms. Karen Angelucci to the Landscape Review Committee.

C. The staff wished the Board members and their families a safe and happy Thanksgiving holiday.

VI. **NEXT MEETING DATE** - The Chairman announced that, due to the Christmas holiday, the next meeting date would be December 16, 2011, which is two weeks earlier than usual.

VII. **ADJOURNMENT** - Since there was no further business, the Chairman declared the meeting adjourned at 4:02 p.m.

Louis Stout, Chairman

James Griggs, Secretary